

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

CONNIE PILLICH, PROSECUTING	:	APPEAL NO.	C-240625
ATTORNEY OF HAMILTON COUNTY,	:	TRIAL NO.	A-2401759
OHIO,	:		
Plaintiff-Appellee,	:		
	:		<i>JUDGMENT ENTRY</i>
vs.	:		
KIMBERLY EDELSTEIN,	:		
Defendant-Appellant.	:		

This court sua sponte removes this cause from the regular calendar and places it on the court’s accelerated calendar, and this judgment entry is not an opinion of the court. *See* Rep.Op.R. 3.1; App.R. 11.1(E); Loc.R. 11.1.

On April 19, 2024, the Hamilton County prosecutor (“the prosecutor”) filed a complaint against defendant-appellant Kimberly Edelstein, then alleged to be a resident of Indiana, seeking a declaration that Edelstein was a vexatious litigator under R.C. 2323.52. The complaint described voluminous filings by Edelstein in the First District Court of Appeals; the Ohio Supreme Court; the Courts of Common Pleas in Hamilton, Warren, and Franklin Counties; and the United States District Court for the Southern District of Ohio.

The prosecutor unsuccessfully attempted to serve Edelstein with the complaint by certified mail to an address in Indianapolis. Certified mail service was returned unclaimed on May 17, 2024. The docket reflects that, on May 20, 2024, the complaint was sent to the Indianapolis address by regular mail and that the May 20, 2024

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mailing was not returned.

On June 13, 2024, Edelstein filed a motion to dismiss the complaint for lack of service of process, among other reasons. The motion to dismiss contained an exhibit, entitled “Reasonable Grounds for filing writs and affidavits of disqualification,” but was not supported by affidavits or evidence as to the service of process issue. Edelstein filed a reply brief in support of her dismissal motion on July 12, 2024. It too was unsupported by any evidentiary material.

On July 12, 2024, the trial court denied Edelstein’s motion to dismiss, finding that the time to perfect service had not yet elapsed. Edelstein moved the trial court to reconsider its decision, again offering no evidentiary support for her position as to lack of service. The trial court denied the reconsideration motion, finding that service on an out-of-state party by regular mail is proper if certified mail is returned as unclaimed.

On August 14, 2024, Edelstein answered the complaint. She later amended her answer to include counterclaims against the prosecutor.

On August 21, 2024, the trial court issued notice of a hearing to be conducted on August 29, 2024. The notice did not specify what matters would be addressed at the hearing. Edelstein filed an “Emergency Motion for Continuance” just before the hearing on August 29, 2024, but she nonetheless appeared by telephone. At the hearing, the prosecutor asked the trial court to determine that Edelstein had been served as of May 20, 2024, the date the docket reflected that regular mail service was delivered and not returned. Edelstein contested the finding by arguing that she had not actually received the complaint by regular mail, as she was no longer residing at the Indianapolis address. But Edelstein was not under oath at the time. The trial court granted the prosecutor’s request and found that service had been effectuated on

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Edelstein. The trial court also granted Edelstein’s continuance request and reset the matter for a “final hearing” on September 26, 2024. Its subsequent written order specified that the parties must attend in person.

In advance of the final hearing, the prosecutor submitted a “Notice of Submission of Evidence.” Attached to the notice were certified copies of the various court filings by Edelstein that the prosecutor alleged to be vexatious. Also, prior to the final hearing, Edelstein filed emergency motions to appear virtually and for a continuance, which the trial court denied. In the former, she argued that she has been diagnosed with a disability and that she is entitled to an accommodation under the Americans with Disabilities Act. Edelstein supported her motion with an unauthenticated note from an urgent care facility that appears not to be signed by a doctor. She additionally filed her own “Notice of Evidence” and issued three subpoenas to witnesses for the final hearing, two of which the trial court quashed.

Edelstein was not present at the September 26 hearing. The trial court heard argument from the prosecutor and took the matter under advisement. The prosecutor did not move the exhibits attached to the “Notice of Submission of Evidence” into evidence, nor did the trial court take any action to admit the exhibits into evidence. The record does not reflect whether the third witness subpoenaed by Edelstein appeared in response to the subpoena.

On September 30, 2024, the trial court issued a decision finding Edelstein to be a vexatious litigator. It issued an amended entry on October 30, 2024, which additionally denied Edelstein’s counterclaims as moot. Edelstein sought leave to appeal to this court, which we granted.

Edelstein raises five assignments of error on appeal, two of which we find to be dispositive. First, Edelstein challenges the trial court’s determination that she was

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served with the complaint. We review a trial court’s findings regarding proper service for an abuse of discretion. *Simpson v. Simpson*, 2024-Ohio-4, ¶ 29 (1st Dist.).

Pursuant to Civ.R. 4.1(A)(1)(a), 4.3(B)(1), and 4.6(D), service of process upon an out-of-state party may be made by ordinary mail if certified mail service has been returned unclaimed. *See, e.g., Spotsylvania Mall Co. v. Nobahar*, 2013-Ohio-1280, ¶ 21 (7th Dist.) (observing that “every Ohio district court that has considered the issue has found service via regular mail to be proper”). Service by this method creates a rebuttable presumption of proper service. *See Sanders & Assocs., LPA v. Responsive Surface Technology, LLC*, 2023-Ohio-3990, ¶ 9 (1st Dist.) (“[i]f a party complies with the civil rules governing service of process, a rebuttable presumption of proper service arises”). To rebut the presumption, “the other party must produce evidentiary-quality information demonstrating that he or she did not receive service.” *Sears v. Kuhn*, 2022-Ohio-2898, ¶ 16 (4th Dist.). The trial court may assess the credibility and competency of the evidence demonstrating nonservice, and the court is not required to give preclusive effect to a defendant’s sworn statement that she did not receive service when the record contains no other indication that service was ineffectual. *Id.*, citing *Boggs v. Denmead*, 2018-Ohio-2408, ¶ 31 (10th Dist.); *TCC Mgt., Inc. v. Clapp*, 2005-Ohio-4357, ¶ 15.

The trial court found, and the docket reflects, that certified mail service was returned unclaimed on May 17, 2024. Thus, pursuant to Civ.R. 4.1, 4.3, and 4.6, ordinary mail was the proper method by which to serve Edelstein. The trial court concluded that regular mail service was complete on May 20, 2024 and not returned. This created a rebuttable presumption that service was proper.

As the party seeking to rebut that presumption, Edelstein bore the burden of presenting evidentiary-quality information to prove that she did not receive service.

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Edelstein did not carry that burden. Her various motions challenging service contained no evidentiary support, and Edelstein's statements to the trial court were in the nature of argument rather than testimony. Moreover, even if Edelstein's statements at the August 29 hearing were taken as evidentiary, the trial court was in the best position to assess their credibility and competency. *See Sears* at ¶ 16. We accordingly see no abuse of discretion in the trial court's finding that service was proper. Edelstein's first assignment of error is overruled.

In her fifth assignment of error, Edelstein challenges the process by which the trial court reached its judgment. She alleges that the trial court abused its discretion by ignoring the civil procedure rules and violated her due process rights by restricting her ability to defend against the allegations in the complaint. We agree, at least as to the applicability of the Ohio Rules of Civil Procedure to the prosecutor's complaint.

R.C. 2323.52(C) provides that “[a] civil action to have a person declared a vexatious litigator *shall* proceed as any other civil action, and the Ohio Rules of Civil Procedure apply to the action.” (Emphasis added.) The trial court, however, neglected to apply various civil procedure rules to this action. For one, Civ.R. 16(B) requires the trial court to issue a scheduling order “as soon as practicable, but unless the court finds good cause for delay, the court *shall* issue it within the earlier of 90 days after any defendant has been served with the complaint or 60 days after any defendant has responded to the complaint.” (Emphasis added.) A scheduling order may contain deadlines for various filings, the parties' initial disclosures under Civ.R. 26(B)(3), discovery, and trial. *See* Civ.R. 16(B)(3). The trial court neglected to issue a scheduling order in this case. Nor does it appear that the trial court conducted a proper trial in accordance with the civil rules. It gave notice of a “final hearing,” but Civ.R. 39 requires the court to conduct a trial. *See* Civ.R. 39(B)(1) (“Issues not demanded for

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trial by jury as provided in Civ.R. 38 *shall* be tried by the court.”) (Emphasis added.)

The use of the word “shall” connotes a mandatory duty on the part of the trial court. *State ex rel. Ewing v. “Without A Stitch,”* 37 Ohio St.2d 95, 103 (1974) (“the word ‘shall’ in a statute must be construed as imposing a mandatory duty unless there appears a clear and unequivocal legislative intent that it receive a meaning other than its ordinary meaning”). Accordingly, rather than setting the matter for a “final hearing” without addressing discovery, the status of Edelstein’s counterclaims, or Edelstein’s unquashed subpoena, the trial court should have entered a scheduling order and set the matter for trial.

We accordingly sustain Edelstein’s fifth assignment of error, reverse the trial court’s judgment, and remand the cause to the trial court for further proceedings consistent with the Ohio Rules of Civil Procedure. On remand, the trial court retains its lawful discretion to carefully limit the scope and timing of discovery and the submission of evidence at trial. This holding renders moot Edelstein’s second, third, and fourth assignments of error, and thus we do not address them. *See* App.R. 12(A)(1)(c).

The court further orders that 1) a copy of this Judgment constitutes the mandate, 2) the mandate be sent to the trial court for execution under App.R. 27, and 3) costs shall be taxed under App.R. 24.

KINSLEY, P.J., ZAYAS and NESTOR, JJ.

To the clerk:

Enter upon the journal of the court on 8/13/2025 per order of the court.

By: 
Administrative Judge